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CONCERT AS AMOUNTING TO CONSPIRACY IN INTERSTATE COMMERCE, BUT NOT IN INTRA-STATE TRADE

In 79 Cent. L. J. 163, we discussed the question of "Moral suasion of acts in concert as coming under the (Federal) Anti-Trust Act," taking as the basis for treatment decision in Eastern States Retail Lumber Dealers' Assn. v. United States, 34 Sup. Ct. 951.

There we contended that that case showed that any agreement which showed that there was a moral compulsion created on dealers in articles in interstate commerce, whose natural tendency was to affect the free flow of that commerce, was not relieved of illegality because it operated peacefully. And we supposed that this same rule would apply to an agreement on the part of labor.

Now we come to consider an agreement by labor unionists peaceably and by persuasion as exemplified in a decision by Fourth Circuit Court of Appeals in the case of Mitchell v. Hitchman Coal & Coke Co., 214 Fed. 685.

It seems to us impossible to reconcile these two decisions except by distinguishing movements the result of concerted action made so far as interstate commerce is concerned from those made to affect ordinary business.

Thus in the former decision it was urged that the moral suasion exerted was needed for the protection of the retail trade in lumber and the contention was answered by the court saying that as to interstate commerce, Congress "has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted." In other words a concert, whose tendency is to "unduly obstruct the free flow of such commerce" amounts to a conspiracy to accomplish an unlawful purpose.

In the latter decision it was held that the rules of labor union, designed to "control or rather abrogate and destroy the right of the employer (owner of a coal mine) to contract with the men (members of a labor union) independent of the organization," is not concert amounting to a criminal conspiracy, because such a result comes within the lawful purposes of a labor organization.

The court, in arguing, compares the efforts by employer and employee, in the case before the court as follows: "The plaintiff has adopted a policy by which only nonunion men may be employed. If the plaintiff may for the purpose of protecting its interests adopt a policy by which only nonunion men can secure employment at its mines and such conduct be sanctioned by the law, by what process of reasoning can it be held that the defendants may not adopt the same method in order to protect their interests? If the plaintiff is to be protected in the use of such methods, and the defendants are to be restrained from using lawful methods for the purpose of successfully meeting the issue thus raised by the plaintiff, then indeed it may be truthfully said that capital receives greater protection at the hands of the courts than those through whose efforts capital in the first instance was created. But such is not the law."

We do not greatly like this statement, made, by way of antithesis, as the dispassionate statement of a legal proposition. It makes no great difference as to its real truth that "capital in the first instance was created" by labor. The question is aside from that and the last analysis of such a factor is to make every contribution to the creation of capital participate in its control. The laborer who works for an employer gets his legal claim fully satisfied in the wages he receives just as a seller of

machinery to a mine gets his full satisfaction in what he is paid therefor.

The real truth of the proposition rests on the fact that the laborer and the capitalist are aiming at lawful ends, each on his side. If one purpose conflicts with the other that is merely a sort of attrition in the open market of demand and supply. When the efforts of either interrupt the free flow of interstate commerce there is a well defined exception to the law of free competition. Congress has placed an arbitrary ban on this law so far as interstate commerce is concerned, and concerted action to do away with the ban is evidence of a criminal conspiracy.

The opinion of the lower court, which is reversed, seems to admit, that there is nothing in the way of producing the attrition of which we speak above but the fact, as the judge declares, that at common law it was conspiracy for members of trades unions to combine to raise their wages, and in West Virginia this part of the common law has never been abrogated by statute.

The Court of Appeals disposes of this contention very thoroughly and really makes the lower court appear to be resorting to a view inconsistent with both English and American decisions and wholly against its better knowledge. There seem to be nothing more than dicta "found in the ancient books of a doctrine that it is criminal for one man, independently of a combination, to oblige another by bond or otherwise, to abstain from the exercise of his proper craft or employment," but as said by the Court of Appeals of Virginia: "It is well settled by the decisions of the courts of the United States and of the highest courts of a majority of the States in the Union, that labor may organize as capital does for its own protection and to further the interests of the laboring class."

Decision seems settled down to the proposition that a strike and persuasion of others to join a strike may be resorted to for the legitimate purpose of advantage to the strikers, but violence to others is not allowable and agreement to resort to violence to accomplish the purpose of a strike amounts to a criminal conspiracy.

It was claimed in this case that the union was a combination in restraint of interstate commerce, but the court disposes of this on two grounds, one that the pleadings make no such point and the other that injunctive remedy is not available at the suit of a private party, but he has his suit, if any, "for three fold damages." But if there was no violence, we do not see that the suit would lie, if a labor union has the right to work for results that are legitimate, except that the natural tendency of concerted action is to obstruct the free flow of commerce between the states. But when you come to apply this rule the policy of the plaintiff to employ only nonunion men may become equally inhibited and if the only damage is to interfere with that policy, harm thereto would be *damnum absque injuria*. Or it might be that all parties being in *pari delicto* no recovery may be had by either.

NOTES OF IMPORTANT DECISIONS

CONTRACT—VALIDITY OF AGREEMENT SHORTENING TIME WITHIN WHICH TO PLEAD USURY.—It was urged in R. J. & B. F. Camp Lumber Co. v. Citizens' Bank, 82 S. E. 492, decided by Supreme Court of Georgia, that agreement providing for the question of usury being raised within six months was based on the consideration in a subsidiary contract, to-wit: the releasing of property held by the creditor as security for a note.

The Court disregards the claim of consideration for the subsidiary contract, because it is tied back to the main contract and is poisoned by the presence of usury therein, and because "the surroundings of the case indicate that the (subsidiary) agreement was secured through 'a kind of moral duress just as debtors are supposed to pay usury in ordinary cases.'"

This reasoning is sound, for, indeed, any usury law easily would be open to evasion by the kind of agreement shown in this case.

The Court said: "Like the note itself, the effort to secure the note and require the lum-

her company to bring suit within six months is absolutely void. Nor could the lumber company waive its legal rights upon a consideration which was usurious and void." Therefore, it was said that cases holding that a period fixed by statute for bringing a suit may be lessened are not applicable, because they "relate to contracts where the subject-matter was lawful and were based on a valid consideration."

The doctrine of this case is wholesome and, considering that the basis of illegality in an usurious contract is duress, it is impossible to see why the law should not presume that it was present in all subsidiary or incidental things connected with the main thing.

SALES—RESTAURANT SUPPLYING CUSTOMERS WITH UNWHOLESOME FOOD.—Connecticut Supreme Court of Errors hold that the Sale of Goods Act, the act recommended by Commissioners on Uniform State Laws, does not embrace within its provisions the supplying of food by a restaurant keeper to customer. Therefore, if customer is furnished unwholesome food, partakes thereof and is made sick, his only right of action is for negligence and not upon any implied warranty in the sale of an article. Merrill v. Hodson, 91 Atl. 533.

It was said the "Sale of Goods Act has not, in its definition of a sale or its provisions for implied warranty of quality, departed from the common law in any respect," so far as the furnishing of food by an inn-keeper is concerned, and that a resturant keeper differs only from an inn-keeper in the respect that he does not furnish lodging or shelter.

Describing the transaction between a customer and a restaurant keeper, it is said: "The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him or of that portion which is carved for his use, or of that which finds a place upon his plate, or in side dishes set about it. He is privileged to eat and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants, but there he must stop. * * * The true essence of the transaction is service in the satisfaction of a human need or desire—ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required." And so the writer of the opinion proceeds.

We greatly doubt whether this aptly describes what a restaurant keeper does. He more resembles a saloon keeper than an inn-keeper. Both supply particular things for consumption and charge accordingly therefor. An inn-keeper rather might be one who offers a guest what he may prefer out of a number of things to choose from. The restaurant keeper sells for a fixed price the particular thing his customer calls for, who is not in any sense a guest.

We do not think in a case of health the refinement urged applicable even to an inn-keeper, but, if it does apply, since we must refine to excuse him from implied warranty, the common law should not be invoked to save a restaurant keeper—a kind of avocation of which that law knew little about. We hold the merchant responsible for selling impure food to a customer, and it does not seem reasonable to excuse the customer in disposing of it to another customer.

MASTER AND SERVANT — ASSUMPTION OF RISK AS TO UNSAFE PLACE WHERE SERVANT KNOWS INSPECTION IS INADEQUATE.—Medina Valley Inv. Co. v. Espino, 214 Fed. 732, decided by Fifth Circuit Court of Appeals, holds that, where a master exercises the primary duty of providing a safe place to work, he is not liable for accident arising out of its becoming unsafe, if the servant knows that inspection to keep it safe is inadequate.

The facts in this case show that a servant was employed to drill holes for blasting purposes. Being directed to drill a particular hole in a slanting direction, his drill either struck an unexploded charge in another hole, or so close thereto, as to cause it to explode. On the day before, a number of holes had been drilled and charged and the work was dangerous because of unexploded charges in other holes, but it was defendant's duty carefully to inspect ground where holes had been charged before ordering drilling near them.

The court said: "Here was a man, skilled, evidently, having had seven years' experience, at least, in this particular kind of work, knew the danger of some of the shots being unexploded, observing the method of inspection on the particular day, and, knowing that that inspection was not such as would discover the unexploded shots, knew that that inspection was the usual inspection made by the master in this case, and with all this knowledge, goes into the pit and proceeds to labor and is injured. It

seems to us that he assumed the risk and is not entitled to recover."

This goes a considerable ways in holding assumption of risk. Had the master have told the servant, after such an inspection, that the place was safe, he would have been justified in doing the drilling he did, unless it was obvious there was an unexploded shell. But when he inspects and orders the servant into the pit and then how to drill a particular hole, this is equivalent to an express statement that the place is safe from unexploded shells. When the court deduces that the ordinary inspection, being insufficient, risk is assumed from the servant's knowledge of such insufficiency, the court places danger, not obvious, in the category of danger that is obvious. A master's assurance by inspection ought to be worth something to a servant and it seems illogical to allow him to escape by negligence in inspection. This raises a defense for a master, arising out of his own negligence.

DEEDS—RESERVATION BY PAROL OF GROWING CROPS.—In Willard v. Higdon, 91 Atl. 577, decided by Maryland Court of Appeals, it is held that growing crops, such as wheat, may by parol be reserved to the grantor, because the deed does not necessarily pass to the grantee such crops as being personal property.

This question has been variously decided, as appears from Devlin on Deeds, Sec. 980c. There it is said that one line of cases holds that to admit a reservation by parol violates the rule of contradicting by parol the terms of a written instrument. By the other line it is ruled that this does not so operate, though without such reservation the crop would pass to grantee.

It would seemto be a nice distinction to say that, though naturally crops would pass by the deed, yet as they may be deemed personal property in a parol exception, there is no violation of the rule that parol evidence is not admissible to vary the terms of a written instrument. Any instrument that on its face carries property ought to have its full force without such refinement applied to it. For example, if a grantee immediately reconveyed, his grantee should have the full benefit of all that the deed carries. But this rule would have effect even though there was a writing outside of the deed to him, if his grantee took without notice. If crops go with the deed where there is no reservation, then in law they should be converted into personalty by a reservation on the face of the deed or by an instrument of equal dignity as the deed and recorded as the deed is required to be. Our registration laws should protect land titles as to everything purporting to be included in a deed.

WORKMEN'S COMPENSATION QUESTIONS IN THE BRITISH COURTS.

The Law of Workmen's Compensation has been in operation in Great Britain since 1897 and has been the occasion of more litigation in the comparatively short period which has since elapsed than any other piece of legislation. In view of the fact that several legislatures in the United States have now enacted similar laws, it has been suggested that a short statement of the problems which arise in the British courts, might be helpful to American practitioners. I accordingly have pleasure in giving one or two points of difficulty and interest which have just recently been settled here.

The important question under the Workmen's Compensation Act is whether an accident to a workman arose out of and in the course of the employment, for the statute only gives compensation in respect of accidents so happening. Now nearly all accidents arise in the course of a workman's employment, but though an accident arise in course of the employment, it might not arise out of it, and I mention three classes of cases in which that distinction was drawn.

1. *Seamen on Shore.* When a sailor goes on shore on the ship's business, an accident which he meets with there such as stumbling on the street or being injured by say a slate flying from a roof, is an accident arising in course of his employment, but it may not arise out of his employment, because such an accident might happen to any member of the public as well as to him. When the sailor is returning to his ship the situation is not changed so long as he is on shore, but what happens when he reaches the quay? Is he then in the sphere of his employment? Very narrow cases have been decided on this point, but it is now settled that till the sailor reaches the gangway, he is not in the sphere of his employment. In several cases it has been decided that if he falls from the quay into the water, com-

pensation is not payable, but if he reaches the gangway, it is, for the gangway is the access from the quay to the ship and forms part of the employer's premises, and the danger which attends a seaman crossing it is a risk arising out of the employment. It is not one to which the general public are exposed. On the other hand the risk of falling from a quay is common to everyone and is not therefore specially connected with a seaman's employment.

2. *Drunkenness.* The cases in which this element was present have raised distinctions finer and if possible more subtle than any other distinctions in this branch of law. A workman meeting with an accident when intoxicated, has by his intoxication, it is argued, introduced into his employment "an added peril," so that the accident does not arise out of the employment at all, but has introduced a completely fresh danger which is not an employment risk. But there have been conflicting decisions, though the tendency is in favor of the theory of "added peril." Thus in a recent case a drunk seaman was late in returning to his ship, and was thrown on board like a sack. After a little he rose to his feet and staggering backwards fell overboard and was drowned. Compensation was refused on the ground that the seaman by being so drunk had added a peril to his employment; and in another case lately decided, a commercial traveler who was very drunk, fell from a railway platfrom and was killed by a passing train. Compensation was refused for "the risk he ran was not one of the ordinary risks of a commercial traveler, or of a commercial traveler who was possibly careless or rash, but a special risk made for himself and by himself by so indulging in intoxicants that he had not reasonable control of his movements." These words quoted from the opinion of one of the judges are just an extended statement of the words "added peril."

3. *Disobedience to Workshop Rules.* The leading case on this point is *Plumb v. Cobden Flour Mills* where a workman had improvised a mechanical convenience for the easier performance of his allotted tasks, and had in so working sustained injuries. It was held that the accident did not arise out of the employment. "There are prohibitionists," said Lord Dunedin, in that case, "which limit the sphere of employment and probibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." Thus a man told not to oil a machine when in motion recovered compensation for an accident he sustained when oiling it in motion, but compensation was refused to a workman who was injured when cleaning a machine on a day which was not one of the stated days for machine cleaning. And to take the most recent case that of a railway porter who had as part of his duties to be in attendance upon the platform to transfer luggage to and from passenger trains running on main and local lines. A train stopped at its usual place twenty yards from where he was standing. As the van passed he tried to jump on so as to be ready to remove luggage as quickly as possible. He fell and was injured. Jumping on trains by porters was strictly forbidden, and he had been checked and warned against the practice. The Court of Sessions, Second Division, have held that the accident arose out of and in the course of the employment. The rule laid down by the employers had been disobeyed, but the disobedience did not take the workman out of the scope of the employment. His indiscretion prompted by overzeal was considered not to amount to a departure from his proper sphere of service. He was performing his duty in an indiscreet manner, but still he was performing it.

DONALD MACKAY.

Glasgow, Scotland.

SHOCK AS BEING ACTIONABLE IN NEGLIGENCE.

Definition of Shock.—I have preferred in treating this subject to employ the word "shock" rather than "fright," as commonly used. The former imports a physical effect; which, at least, in some cases all of the courts hold to give occasion for the recovery of damages; the latter never affords the basis for such recovery. For example, we will suppose one negligently lets loose a blast in the vicinity of a dwelling house. One member of the household is frightened, another is struck and a third is seriously shocked. The first has no right of action, the second has, and whether the third has depends on other circumstances. Fright has nothing to do with the right of recovery in the second case, nor has it in the third except that shock may be the physical effect of fright. The intervening fright, however, does not break the chain of causation between letting off the blast and the shock any more than it breaks it where one is struck. A physical result ensues in both cases, and if fright is intended or foreseen a strike or a shock, a something of tangible character, may also be intended or foreseen.

Furthermore, shock being the substantial thing to be considered, fright is not the only antecedent to its existence, so far even as its actionableness is concerned. What, then, is shock? Its presence in a human being has been called: "A sudden and violent effect tending to impair the stability and permanence of something; a damaging blow to a person's health or constitution. A sudden and disturbing impression on the mind or feelings, usually one produced by some unwelcome occurrence or perception, by pain, grief or violent emotion (occas. joy) and tending to occasion lasting depression or loss of composure; in a weaker sense, a thrill, start of surprise or of suddenly excited feeling of any kind. A sudden debilitating effect produced by overstimulation of nerves, intense pain, violent emotion, or the like; the condition of nervous exhaustion resulting from this."[1]

Thus far we see nothing of "fright" causing shock. In another Dictionary[2] we learn that "shock" is "a strong and sudden agitation of the mind and feelings; a startling surprise accompanied by grief, alarm, indignation, horror, relief, joy or other strong emotion." As showing susceptibility to injury, an excerpt is made from George Eliot's writings that: "She has been shaken by so many painful emotions, that I think it would be better, for this evening at least, to guard her from a new shock if possible." Among the cases hereinafter submitted it will appear that "fright" as the precursor in many of them do show fright and shock. The inquiry is whether emotion may be so suddenly and violently stirred by a negligent act as to cause serious shock. If this is through causing fright, it is the same as though the act caused grief. As an illustration of shock arising from grief, in which recovery was allowed is an English case.[3] This was a case of wilful tort in a practical joker informing a wife that her husband had met with a serious accident, but the principle of resulting shock howsoever produced giving right to damages is illustrated. And in Massachusetts,[4] where the rule is against recovery, "fright, terror, alarm and anxiety" are placed in the same category. "Great emotion may, and sometimes does, produce physical effects." And it refused to place its judgment on the ground that physical injury may not be directly traceable thereto. It may be said, however, that in almost all of the cases, fright as accompanied by the physical injury, was in the facts and this has caused courts to speak

(1) VIII New English Dictionary, 721.

(2) VIII Century Dictionary and Cyclopedia, Title, "Shock."

(3) (1897) Wilkinson v. Downton, 2 Q. B. 57.

(4) Spade v. Lynn & C. R. Co., 168 Mass. 285; 60 Am. St. Rep. 393.

of fright resulting in shock and not other emotion so resulting. We need, however, to get back to the idea that it is shock as a physical fact and howsoever caused, that is the thing of importance.

Acts of Wilful Tort Causing Shock—The cases seem to be in practical unanimity that where shock, or mental disturbance amounting to serious shock, results from a deliberate and wilful tort the wrongdoer is liable in damages. Thus there is the case of Wilkinson v. Downton, *supra,* where the shock was from grief. And shock to the mind of a woman resulting in miscarriage from a drunken man entering a house where the woman was and threatening to shoot her, required a verdict for plaintiff.[5] And the Spade case *supra* expressly excepts from its ruling, "those classes of action where an intention to cause mental distress or hurt the feelings is shown or is reasonably to be inferred." In Missouri it has been ruled that shock from a wilful tort, resulting in neurasthenia was the basis for an action for damages.[6] The learned judges in that case said that "suffering thus occasioned is as much due to physical injury as that which results from an open wound or the surface of the body." This court might hold that unintentional negligence would give no right of action, but it would have to do so on some other theory, than its not producing a wound in the body.

And an Iowa case[7] distinguishes the cases against recovery for injuries resulting from fright, or as I say from shock, by portraying the wilful, deliberate wrong perpetrated by the defendant, and saying: "His discovery there under such circumstances might well cause alarm to the boldest man, and if it produced nervous prostration and physical disability, the theory, no matter what its reason, that would say there was no actionable wrong, would be too fine spun and too cold for our sanction." But if you allow recovery for a wilful tort, there must be some other reason in unintentional negligence than that it is not a physical injury, or that the injury is of a class that is easily feigned. It was said in speaking of the policy of the law against fictitious claims that "greater evil would result from a holding of no actionable wrong than can possibly follow the rule we announce," viz: that shock causing prostration gives a right of action.

In New York,[8] where there was an assault alleged to have caused nervous prostration and maniacal insanity, there was quoted from the Court of Appeals[9] that one cannot recover damages from fright disconnected from other injuries, but it was ruled to have no application to the case before the court, because for negligence purely the measure of damages is confined to the natural and probable consequences of the act or omission constituting the cause of action. It did not hold, however, that nervous prostration and insanity from a wrongful act were not physical injuries, which might not be recovered for if reasonably contemplated by such an act.

And so in a Vermont case,[10] where the situation of a blind girl, a guest in the house, was referred to, where defendant's conduct caused her to be "so frightened and shocked in her feelings as to injure her health." Here the shock and injury to health were the physical evidences of recoverable damages.

The Spade case, *supra,* regards also as actionable "cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences when they must have been in the actor's mind."

Occasion of Fright Not Being Actionable, Shock is in Same Category.—This is

(5) Barbee v. Reese, 60 Miss. 906.
(6) Hickey v. Welch, 91 Mo. App. 4.
(7) Watson v. Dilts, 116 Iowa 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239.
(8) Williams v. Underhill, 63 N. Y. App. Div. 223, 71 N. Y. Supp. 291.
(9) Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604.
(10) Newell v. Whitcher, 53 Vt. 589, 38 Am. Rep. 703.

the doctrine held by many cases. But it seems opposed to all principles in regard to proximate cause. The chiefest exponent of this doctrine is a New York case,[11] which says: "Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can be, then an action may be maintained, however slight the injury; if not, there can be no recovery, no matter how grave or serious the consequences."

Verily, this seems a play upon words and if it be true that the results of fright cannot be recovered for because mere fright is not actionable, then it makes no difference whether a wrong causing fright be wilful or reckless or that it arise out of unintentional negligence, and it comes down to the fact, that one knowing that fright will produce shock may intentionally or unintentionally frighten one with impunity.

Following this case, an Arkansas case[12] says: "Where the law allows no recovery for the mental anguish or fright, it would seem logically to follow that no recovery can be had for the consequences or results of the fright." and strange to say, in support of this proposition, there is cited, in addition to the New York case, the Spade case, *supra*, which case specially excepted "cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences when they must have been in the actor's mind." This case proceeds on the theory that "as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness," thus strongly implying that if the carrier knew to the contrary, he must anticipate or guard against an injurious result "to such a person, or make itself liable therefor."

Apart from the oft-quoted definition of proximate cause,[13] which excludes as an intervening cause breaking the chain of causation, anything set in motion by the wrongdoer himself, the argument in the New York case is well answered by an English case,[14] which refers to it: "If the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact?" And this just as well might have been asked about grief as about fear, for, after all, it is the mental disturbance directly producing the physical effects which makes, or not, the wrong actionable, in other words it is the shock and not the fear or the grief, which is measurable in damages and, therefore, actionable. It seems, however, somewhat pitiable to see a court declaring, that shock, which produces a mental disease, gives no ground of action because a sudden impulse of feeling, not itself actionable, is the origin of the shock. As well might it be said, that one is not responsible for a gun-shot wound because for detonation that propels the bullet there is no liability. Human feelings are as explosive as powder and sometimes just as destructive, and the wilful wrong or negligence, which sets them in motion, should be deemed to be dealing with an agency with no more power of volition than an inanimate and destructive substance. Shock is the result of sudden emotion, a thing that is wholly involuntary

(11) Mitchell v. Rochester, supra.
(12) R. Co. v. Bragg, 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206.
(13) R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256.
(14) Dulieu v. White (1901), 2 K. B. 669.

and against which, in some instances, not even preparation by a victim wholly may provide. For example, if a pregnant woman is warned that she is to be attacked, no sort of preparation before hand would save her from shock and its consequences, and if she is a passenger on a train, fear of a wreck for hours before, aids in no way to arm her against shock. On the contrary, dwelling upon these things may but increase her susceptibility to an injury in the mind, which will break down her nerves and make a lasting impairment of her health. These are things of which courts should take judicial notice, for they are known of all men.

But a Wisconsin[15] case is so very apt on this question that I quote therefrom: "It is charged that the shock was directly caused by the defendant's negligent act and that the miscarriage was caused directly by the shock. Now, if the shock can legally operate as the connecting link between the defendant's negligent act and the plaintiff's miscarriage, so that the negligence was truly the cause which operated first and set in motion the train of events which ended in the miscarriage as the natural and probable result, then it does not become necessary to decide whether 'shock' as here used is a physical or mental disturbance, or whether, as seems more reasonable, it partakes of both." There are then cited a number of cases as to which it is said: "In some of these cases the negligent act of the defendant, which was relied on as the proximate cause of the subsequent physical injuries, did not consist of a physical violence, or hostile contact, but only consisted of a negligent or wrongful act which produced extreme fright or shock, from which extreme fright or shock, physical injuries naturally resulted, but in all of the cases the chain of causation was held to be complete in case the jury found that the defendant should have anticipated that an injury to another might follow as the natural and probable result of his negligent act."[16]

In Alabama[17] it was said to have been determined by the Engel case that "there is no legal obstacle to prevent the recognition or fright or terror as the proximate cause of a physical injury."

Notice or Knowledge as Affecting Liability—A late decision by Georgia Court of Appeals,[18] summarizes opinion on this question as follows: "To put the matter in condensed form, it appears that no recovery can be had for fright alone, caused by less than such gross negligence on the part of one acquainted with the condition of the plaintiff, or with the facts and circumstances surrounding the plaintiff, as would authorize the conclusion that the defendant must have known that certain definite physical injuries would naturally flow from or follow the fright or nervous excitement brought about by him, or unless the fright, resulting in physical injuries or impairment of health, should have been brought about deliberately, maliciously or wantonly by the defendant through an utter disregard of the natural and probable consequences to the injured party, or from a wilful intent to so injure the party."

Here it is perceived, injury to the feelings is spoken of as a physical fact and in no way of there being a sense of humiliation and disgrace, whether the wrong be intentional or not It is treated like an external wound or hurt, but there seems a distinction as to negligence being gross or not, though in ordinary negligence there might be the same knowledge of conditions. I doubt greatly whether this distinction exists, as every negligence should be deemed

(15) Pankoff v. Hinkley, Wis., 123 N. W. 625, 7 L. R. A. (N. S.) 1159.

(16) See also Purcell v. R. Co., 48 Minn. 134; 50 N. W. 1034, 16 L. R. A. 203; R. Co. v. Hayter, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 32, 77 Am. St. Rep. 856; Engel v. Simmons, 148 Ala. 92, 41 So. 1023, 7 L. R. A. (N. S.) 96, 121 Am. St. Rep. 59, 12 Am. Cas. 740.

(17) Spearman v. McCrory, Ala., 158 So. 927.

(18) Goddard v. Watters, 82 S. E. 304.

such, where any hurtful consequences may be contemplated therefrom.

For example, in the North Carolina case,[19] cited by Georgia Court of Appeals, the matter is put a little differently. Thus it was said: "It must also appear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, *or* that the injury resulted from gross carelessness or recklessness, showing utter indifference to the consequences." In this case it appears that there must be knowledge as to an act merely negligent, but in gross carelessness or recklessness there need be no knowledge. In the Georgia case there must be knowledge as to the accompaniment of gross negligence.

Two later North Carolina cases[17] enforce the rule laid down in the Watkins case of simple negligence with knowledge of plaintiff's condition bringing on liability.

Many cases might be cited along this line, but it seems to me, that it must be patent that the Georgia case has little to support it in its distinction between ordinary and gross negligence. It is true the latter might embrace some cases not within the former, but if so, this would be upon the ground stated in the Spade case, *supra:* it becomes akin to wilful tort and the consequences of knowledge are visited on the wrongdoer, whether he actually has knowledge or not.

The Rule or Policy Excluding Damages from Shock.—The rule has been consistently adhered to in Pennsylvania that mental disturbance and its consequences should not, in negligence cases, at least, be recognized in actions for damages.[20] These cases hold that "fear and nervous excitement and distress caused by a collision of cars on a railroad, producing mental and physical pain and suffering and permanent disability, but unaccompanied by any injury to the person, afforded no ground of action."[21] The later case of Houston v. Freemansburg, *supra.* explained that this doctrine was based on expediency, and its adoption something of a protest against an expansion of the doctrine of negligence so as to embrace intangible, illusory, untrustworthy and speculative causes of action.

It is difficult to see where this protest takes hold, when we consider, that any external injury to the person opens the door to damages for internal injury that also ensues. A pin prick opens the door for heart-break and the abrasion of a finger authorizes damages for the impairment of health. The material thing sued for is the internal pain and this is as illusory, and not more so, in one case as the other.

A New Jersey case[22] is an excellent illustration of what is just said. The plaintiff in this case was passing under an overhead railway bridge, which fell while an engine was passing over it. Something, she claims, hit her upon the back of the neck and dust from the crash got into her eyes. The chief injuries are alleged to be to her eyes and nervous system. Defendant claimed she suffered no physical injury whatever, but that the condition she alleges she is suffering from was due to fright alone.

The court held that proof of either of the external injuries would take the case out of the rule as to non-recovery for fright alone.

(19) Watkins v. Kaolin Mfg. Co. 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617.

(17) Drum v. Miller, 135 N. C. 208, 47 S. E. 424, 65 L. R. A. 890, 102 Am. St. Rep. 528; Kimberly v. Howland N. C., 55 S. E. 778, 7 L. R. A. (U. S.) 545.

(20) Chittick v. Transit Co., 224 Pa. 13, 73 Atl. 4, 22 L. R. A. U. S. 1073; Huston v. Freemansburg; 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (U. S.) 49.

(21) Linn v. DuQuesne Borough, 204 Pa. 551, 54 Atl. 341, 93 Am. St. Rep. 800.

(22) Porter v. R. Co., 73 N. J. L. 405, 63 Atl. 860.

Here it is perceived, the court was possessed of the idea advanced in Mitchell v. Rochester, *supra*, but misapplies it by allowing for the consequences of fright, where there is any external physical injury. And how may it be said that it is legal policy to allow one to tack on to a negligible external injury damages for internal injury, and it is against policy to allow recovery for the latter unaccompanied by external injury? Shall a plaintiff, in order to recover substantial damages, be encouraged to feign an external injury or to falsify as to its existence? In what way is pain or suffering more tangible and less illusory when asserted to arise from an external injury, than impairment of health from a shock to the feelings? At all events, however, these cases for impairment of health as the result of shock, whether that arise from fright or grief, and if they attach to it that there shall be external injury, the principle for which I contend is supported.

This very exception is a tribute to the rule for which I contend and when there is added the other exceptions in willful tort and gross carelessness, which even New York, by decision in lower courts admit, there seems little of square out decision to support the general principle, that there can be no recovery for shock bringing on impairment of health as the result of negligence, where it may be shown to be anticipated, or of reckless negligence or willful tort, whether anticipated or not.

There is a very interesting review of cases in 52 Cent. L. J. 339, in an article, where the same doctrine is advocated as in this article. Many authorities are here used, which were not in existence then, which either squarely or impliedly admit what the former article contended for.

N. C. COLLIER.

St. Louis, Mo

MUNICIPAL CORPORATION.—IMPLIED CONTRACT.

WORELL MFG. CO. v. CITY OF ASHLAND.

(Court of Appeals of Kentucky. June 19, 1914.)

167 S. W. 922.

A city was not liable on an implied contract for the value of insect exterminator purchased for it by the city clerk, who acted without authority, because it was accepted and used by the city, where the general council, which alone had power to bind the city, promptly rejected the bill; since it is better to require those furnishing supplies to, or rendering services for, a city to see that their contracts are made by authorized persons than to permit unauthorized agents to impose unlimited liability, on the city.

CLAY, C. E. A. Shepard was the city clerk of Ashland. On November 2, 1909, he purchased from the Worell Manufacturing Company, for use by the city, 60 gallons of Worell's insect exterminator, at $2 a gallon, and also 400 pounds of Cotto-Waxo sweeping compound, at 3 cents a pound, the whole order aggregating $132. On November 13, 1909, 11 days later, Shepard purchased an additional 60 gallons of the insect exterminator at $2 a gallon. The goods were shipped to the city in Shepard's care. Shepard agreed to see that the bills for same were allowed by the board of council on or before April 1, 1910. Before that time he was removed from office. The board of council declined to pay for the goods. Thereupon the Worell Manufacturing Company brought this action against the city of Ashland to recover the contract price. At the conclusion of the evidence, which failed to show that Shepard was authorized to make the purchase, the trial court directed a verdict in favor of the city. Judgment was entered accordingly, and plaintiff apeals.

The only error complained of is the refusal of the trial court to permit plaintiff to file an amended petition, pleading, in substance, that the city accepted, received, used, and consumed all of the goods set out in the petition, and thereby became indebted to plaintiff for the reasonable value thereof, which was fixed at $252.

The question sharply presented is whether or not a municipality may become liable on an implied contract. In the case of Trustees of Belleview v. Hohn, 82 Ky. 1, it was sought to hold the city liable for the expense of improvement work performed under a void contract. The court said:

"If the reception of work done under a void contract, or its ratification by the town, makes it responsible, then the provisions of its charter may be disregarded in every instance where the city has derived benefits from improvements made within its boundary, although its authorized agents may have failed, when making the contract, or passing the ordinance, to comply with any of the requirements of the charter. If the town is made responsible by reason of its inherent power to improve or make streets, then it follows that such a power must exist with reference to all improvements conducive to the welfare of the city and the necessities of those living within the corporate limits. The duties and powers of municipal corporations are prescribed by statute, and to make them liable, like natural persons, would be to license those who are invested with corporate control to place onerous burdens upon the inhabitants in the way of taxation and otherwise, regardless of the powers and restrictions found in the charter, and by which alone the rights of the corporation must be determined. Courts have found it necessary to execute the powers expressly granted, and to refuse to make corporations liable upon implied promises by reason of benefits received. This is done for the protection of the inhabitants of the corporation, and because the only power the corporation has is from the law creating it, and, instead of recognizing a more liberal rule, the courts are inclined to hold corporations and their agents within the letter of their grant."

In the case of Murphy v. City of Louisville, 9 Bush, 189, the same question was presented, and the court said:

"Nor is the corporation liable for the value of the work by reason of any implied promise to pay, upon the idea that the city derived a benefit from it. If so, as previously argued, it would dispense with the exercise of the power conferred by those in authority to execute contracts, and the contractor, or the party performing the work, at the instance of any official of the corporation, or even inhabitant of the city, could make improvements beneficial to the corporation, and thereby create an implied contract on the part of the city to pay. If the alleged contract is made otherwise than as required by the ordinance, it is not binding; and, if not obligatory as a contract, the law creates no promise to pay. The difference between the contract of a private person and that of an officer of a corporation is this: An individual has the right to make, alter, or ratify a contract at his own will and pleasure with the consent of the party contracting with him, or, if he stands by and permits others to work for him, and accepts the work, the law implies a promise to pay its value; while an officer of a corporation has no power to make a contract, except in the manner pointed out by the statute from which the power is derived. Zottman v. San Francisco, 20 Cal. 96 [81 Am. Dec. 96].

In the case of City of Covington v. Hallam & Meyers, 16 Ky. Law Rep. 128, it was held that, where legal services were rendered in behalf of the city with knowledge of the members of the city council and of the city attorney, this fact did not render the city liable, for the reason that these officials in their individual capacity had no right to make contracts for the city or to employ counsel. It was also held that the fact that the city derived benefit from the services raised no implied promise on the part of the city to pay for them. In the case of City of Owensboro v. Weir, Weir & Walker, 95 Ky. 158, 24 S. W. 115, 15 Ky. Law Rep. 506, it was held that the acceptance of legal services from counsel who had not been lawfully employed imposed no obligation on the city to pay for such services. In the case of District of Highlands v. Michie, 107 S. W. 216, 32 Ky. Law Rep. 761, the court said:

"The trustees of a city or other municipal corporation may not, in their individual capacity, employ counsel to represent it in litigation; nor does the fact that an attorney render services to a municipal corporation entitle him to recover for such services under an implied contract. Municipal corporations must contract through their duly authorized boards, and the individual trustees have no authority to contract for them."

In the case of Floyd Co. v. Allen, 137 Ky. 575, 126 S. W. 124, 27 L. R. A. (N. S.) 1125, Allen performed work and furnished materials for the repair of a county road at the request of the county judge and a justice of the peace, who had no authority to make the contract. Plaintiff insisted that the county should pay him, because it reaped the benefits of his expenditure and labor. In discussing this phase of the case, the court said:

"This presents a very equitable view in his behalf, and would prevail against an individual or private corporation, but the consequences would be disastrous to hold that it should apply to the state or county. To permit the citizen to select his own time, place, and manner, even with the advice and consent of one or two of the officials, in which to furnish material and labor for needed repairs or improvements on a public highway of the county and hold the county responsible for the price charged, upon

the ground that it had been benefited thereby, would be ruinous to the county, and have the effect to supersede the powers of the fiscal court, whose duty it is, under the law, to manage such affairs."

In the case of City of Newport v. Schoolfield, 142 Ky. 287, 134 S. W. 503, it was held that the fact that a municipal corporation received the benefit of a contractor's work did not create a contract by implication on the part of the city to pay for such work. In the case of City of Louisville v. Parsons, 150 Ky. 420, 150 S. W. 498, it was held that all persons contracting with a municipal corporation must, at their peril, inquire into the power of its officers to make contracts, and that such corporations are not liable on implied promises by reason of benefits received. To the same effect is City of Bowling Green v. Gaines, 123 Ky. 562, 96 S. W. 852, 29 Ky. Law Rep. 1013; Craycraft v. Selvage, 10 Bush, 696; Allin v. County Board of Education, 148 Ky. 746, 147 S. W. 920; Perry Co. v. Engle, 116 Ky. 594, 76 S. W. 382, 25 Ky. Law Rep. 813; Floyd Co. v. Owego Bridge Co., 143 Ky. 693, 137 S. W. 237; Grinstead v. Monroe Co., 156 Ky. 296, 160 S. W. 1041; Rowe v. Alexander, 156 Ky. 507, 161 S. W. 508.

The importance of the rule above announced is well illustrated by the facts of this case. Shepard had no authority to make the purchases in question. He purchased enough insect exterminator to last the city for several years. Suppose some of the employes in the building did make use of it, the general council promptly rejected the bill, and it alone had the power to bind the city. In case of this kind a choice has to be made between permitting unauthorized agents to impose liability on a municipal corporation without limit and imposing on those rendering the services for, or furnishing supplies to, a city the necessity of seeing that their contracts are made by persons authorized to make them. It may be that an occasional injustice will result; but it is better that this should be than that the taxpayers of a city whose burdens are already heavy should be subjected to an increased burden imposed by unauthorized agents. Believing that this is the only safe rule, we conclude that the cases of Frankfort Bridge Co. v. City of Frankfort, 18 B. Mon. 41, Nicolasville Water Co. v. Board, 36 S. W. 549, 38 S. W. 430, 18 Ky. Law Rep. 592, Board of City of Frankfort v. Capital Gas, etc., Co., 29 Ky. Law Rep. 1114, 96 S. W. 870, and City of Providence v. Providence Electric Light Co., 122 Ky. 237, 91 S. W. 664, 28 Ky. Law Rep. 1015, to the extent that they announce a contrary doctrine, should be, and they are hereby, overruled.

Judgment affirmed.

NOTE.—*Liability of Municipal Corporation Upon Implied Contract Where Benefits Have Been Received.*—The instant case concedes that the city, in the case considered, could have made, through its proper officers, a contract for the insect exterminator, which was accepted and used in precisely the way it would have been used had an express contract have been made. But it decides the case out of a policy to declare a rule that a public corporation can bind itself only in the way the law prescribes. This theory is strongly applied in Floyd Co. v. Allen, 137 Ky. 575, 126 S. W. 124, 27 L. R. A. (N. S.) 1125, and it has great support in other cases.

If the law requires that a municipality is limited to a certain manner of contracting, no obligation, according to the great weight of authority, arises out of benefits received, where there is no express contract. For example, where a public building was not let on competitive bids. Richardson v. Grant County, 27 Fed. 495. And so as to supplies not purchased on competitive bid. Peck-Williamson H. & V. Co. v. School Township, 30 Ind. App. 637, 66 N. E. 909. And so as to purchasing supplies in a way not prescribed by statute. N. J. Car Spring & R. Co. 64 N. J. L. 544, 46 Atl. 640. So where a letting not according to statute is made. People v. Gleason, 121 N. Y. 631, 25 N. E. 4; Wellston v. Morgan, 65 Ohio St. 210, 62 N. E. 127. And where an express contract for materials exceeds the lawful limit. O'Rourke v. Philadelphia, 211 Pa. 70, 60 Atl. 400; McGillivray v. School Dist., 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100, 88 Am. St. Rep. 960; Litchfield v. Ballou, 114 U. S. 190, 39 L. Ed. 122.

But there is some diversity of view in this question. Thus in Miles v. Holt County, 86 Neb. 238, 125 N. W. 527, 27 L. R. A. (N. S.) 1130, the opinion is quite elaborate and allowed recovery upon a *quantum meruit* on a contract for printing necessary notices which had not been properly contracted for, where the county accepted the services without protest and received enough money from taxpayers to pay for the publication. The measure of damages seems difficult to work out, because it does not appear, that anything more would have happened than the postponement of collection from the taxpayers for another year, but the debts would not have been lost. In fact, penalties in the meantime would have more than exceeded legal interest.

In Concordia v. Hagaman, 1 Kan. App. 35, 41 Pac. 133, an officer of a city, forbidden to contract therewith, was held entitled to recover on a *quantum meruit* for compiling and publishing its ordinances in pamphlet form, the work having been properly done and no unfairness or undue advantage having been taken in obtaining the contract.

In Moore v. Ramsey County, 104 Minn. 30, 115 N. W. 750, it was held that where a street improvement had been made and a benefit conferred upon the county, the *ultra vires* character of the contract was eliminated.

And it has been frequently held that where an express contract could be made, and circumstances raise the inference that payment was intended by the parties, if property or benefit is received, an implied contract is raised. Beardsley, v. Nashville, 64 Ark. 240, 41 S. W. 853; Paving Co. v. Mt. Clemens, 143 Mich. 259, 106 N. W. 888; School Dist. v. School Dist., 78 Vt. 23, 61 Atl. 471; Rice v. Ashland County, 114 Wis. 130, 89 N. W. 908.

But mere use of property by a municipality, or receipt of some benefit therefrom, does not avail to raise an implied promise to pay therefor. Douglas v. Lowell, 194 Mass. 268, 80 N. W. 741, Wilson v. Mitchell, 17 S. D. 515; 97 N. W. 741, 65 L. R. A. 158, 106 Am. St. Rep. 784; Forehand v. United States, 23 Ct. Ct. 477.

It is difficult, if not impossible, to reconcile the cases on this question, and the principle in the instant case, that injustice should occasionally occur rather than that contracts with officers should be permitted to raise an obligation against a municipality, when their powers are such only as conferred by statute, is greatly followed. In not enforcing this doctrine strictly, limitations presented by statute are, to this extent, nullified.

C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1914—WHEN AND WHERE TO BE HELD.

American Bar Association—Washington, D. C., October 20, 21 and 22.

California—Oakland, November 19, 20 and 21.

Missouri—St. Louis, at Planters' Hotel, September 22, 23 and 24.

Oregon—Portland, November 17 and 18.

Rhode Island—Providence, December 7.

Vermont—Montpelier, October 6.

West Virginia—Parkersburg, December 29 and 30.

BOOK REVIEWS.

AMERICAN ANNOTATED CASES, 1914, B.

This series beginning in 1912 continues along in its excellent way until now we have before us Vol. 1914-B. Its cases are selected from state and federal courts, as also from the courts of England and Canada.

In the current volume we find annotations of cases on Amusement Contracts; on Duty of Electric Light Company to Furnish Service Without Discrimination; on Negligence of One Parent as Imputable to Other in Action to Recover for Death of Child; on Construction of Words Repeated in a Will; on Right to Accumulated Income not Expressly Disposed of by Will; on Character of Corporate Debts for which Directors are Liable; on View that Promise must Identify Debt; on Deadlock in Affairs of Corporation as Ground for Appointment of Receiver; on Right to Recover Exemplary Damages for Breach of Marriage Contract; on Liability of Harborer of Dog for Injuries Caused by it, and on various other subjects, the whole comprising a most valuable volume for its well selected cases and the annotation that follows them.

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HUMOR OF THE LAW.

"Mabel, I'm drawn on the grand jury."

"So am I, Gertrude."

"Our responsibilities will be heavy."

"I realize that. What shall we wear?"

"I understand you got into jail," said the warden, "on account of a glowing mining prospectus."

"I was quite optimistic," admitted the gentlemanly prisoner.

"Well, the governor wants a report on conditions in my jail. I want you to write it?"

The Tatler gave a good story about Lord Shaw. In the old days the Scottish Bench in Edinburgh were accustomed to dine at four o'clock in the afternoon, and sometimes these convivial gatherings were prolonged to a late or early hour, as the case might be. At two o'clock one afternoon a client called at the house of a distinguished lawyer and asked to see the master. "He's at dinner," replied the maid. "At dinner!" gasped the caller. "Dinner at two o'clock in the afternoon? Surely, your master dines early?" "No," replied the maid. "It's yesterday's dinner he's still eatin'."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Assignments**—Chose in Action.—The assignment of a chose in action for collection creates a contract analogous to that of a bailment under which the bailee contracts to perform services for the bailor entitling the bailee to retain possession of the chose in action until paid.—Ballinger v. Yates, Colo., 140 Pac. 931.

2. **Bankruptcy**—Composition. — A proposed composition between a bankrupt and his creditors must be accepted in writing by a majority of the creditors, both in number and amount, before the court can order confirmation.—In re Goldstein, U. S. D. C., 213 Fed. 115.

3.——Insurance Policy.—Where insured in an endowment policy assigned it to his wife, reserving the right to surrender it and then became bankrupt and died before the power to surrender was exercised, the wife's right to the proceeds was absolute, notwithstanding Bankr. Act, § 70a.—Eldredge v. Mutual Life Insurance Co. of New York, Mass., 105 N. E. 361.

4.——Venue.—When an involuntary bankruptcy petition was filed in New York against a Missouri corporation, the burden was on petitioning creditors to prove that the corporation's principal place of business was in New York.—In re Tennessee Const. Co., U. S. C. C. A., 213 Fed. 33.

5. **Banks and Banking**—Forged Check.—To the general rule that money paid under a mistake of fact may be recovered, there is an exception that money paid by the drawee of a forged check cannot be recovered.—Farmers' Nat. Bank of Augusta v. Farmers' & Traders' Bank of Maysville, Ky., 166 S. W. 986.

6. **Bills and Notes**—Check.—A drawer of a check, though entitled to stop payment thereon, does not by stopping payment discharge his liability to the payee, or one holding under him, though as between the drawer and the bank the bank thereafter pays at its peril.—Usher v. A. S. Tucker Co., Mass., 105 N. E. 360.

7.——Fraud.—That the manager of a corporation to whom the treasurer gave his personal notes for accrued salary had several months previously falsely represented that he was not interested in a competing company was not sufficient to avoid the notes, though the treasurer testified that he would not have signed if he had known that fact.—Harvey v. Squire, Mass., 105 N. E. 355.

8.——Parties.—The maker of a note is the proper party defendant in an action thereon, and, if he desires that the payee shall be made a party, he must request it.—Tardio v. First Nat. Bank of Bryan, Tex., 166 S. W. 1180.

9. **Carriers of Live Stock**—Limitation of Liability.—A statement in a contract for the shipment of live stock that the condition of the cars and bedding was satisfactory did not relieve the carrier from liability for failure to properly bed the cars; a carrier not being permitted to limit its common-law liability.—Texas Cent. R. Co. v. McCall, Tex., 166 S. W. 925.

10. **Carriers of Passengers**—Notice.—A carrier is not liable for an injury to a passenger occasioned by the presence of a bag in the entrance of a car, unless it was charged with notice that the bag had been placed there, so as to become an obstacle to the safe entrance or exit.—Jackson v. Boston Elevated Ry. Co., Mass., 105 N. E. 379.

11.—Presumption.—A person on a street car is presumptively a passenger in the absence of countervailing circumstances.—Bond v. United Railroads of San Francisco, Cal., 140 Pac. 982.

12.——Proximate Cause.—A street railroad's negligence in suddenly starting a car, concurring with the crowding of other passengers as the proximate cause of plaintiff's injury, made it liable as a joint tort-feasor.—Stoltze v. United Rys. Co. of St. Louis, Mo., 166 S. W. 1102.

13.——A rule of an elevated railroad company, which forbids passengers to stand between the seats except in emergencies is reasonable.—Dewey v. Boston Elevated Ry., Mass., 105 N. E. 366.

14.——Unusual Accident.—A street railroad was liable for injuries to a passenger's wrist by some one turning a seat upon her as she was alighting, if such person was a member of a turbulent crowd violently attempting to board the car, whose presence was not unusual and was dangerous to alighting passengers.—Danovitz v. Blue Hill St. Ry. Co., Mass., 105 N. E. 353.

15. **Constitutional Law**—Interstate Commerce.—One against whom judgment was rendered on a claim not arising in interstate commerce may not urge invalidity, under commerce clause of federal Constitutional and Interstate Commerce of Acts Tex. 31st, allowing attorney's fee to plaintiff in a suit for overcharges on freight, or for lost or damaged freight, or for stock killed by negligence of the railroad company and not paid within 30 days.—Missouri, K. & T. Ry. Co. of Texas v. Cade, 34 Sup. Ct. Rep. 678.

16.——Liberty of Contract.—An infringement of the liberty of contract without due process of law, results from Acts Tex. 31st Leg. c. 46, making it a misdemeanor for any person to act as a conductor on a railway train without having served two years as a freight conductor or

brakeman.—Smith v. State of Texas, 34 Sup. Ct. Rep. 681.

17. **Contempt**—Statute of Limitations.—Criminal contempts are crimes, within Rev. St. § 1044, prescribing a three-year limitation, though the right of trial by jury in criminal cases does not extend to such contempts.—Gompers v. United States, 34 Sup. Ct. Rep. 693.

18. **Contracts**—Consideration.—Fraud relating merely to the consideration or inducement to a contract rather than in its execution is available to set aside the contract in equity, but is not a defense at law.—Maine Northwestern Development Co. v. Northern Commercial Co., U. S. D. C., 213 Fed. 103.

19.——Consideration.—The privilege of naming a child is a valid consideration for a promise to pay money.—Gardner v. Denison, Mass., 105 N. E. 359.

20.——Equity.—Where one party to a contract having no adequate remedy at law for its breach has fully performed his part, the other party cannot set up against the first party's right to redress in equity a defense based on his own default.—Klauster-Meyer v. Cleveland Trust Co., Ohio, 105 N. E. 278.

21.——Fraud.—The rule that one, who, when sued on a written contract, may not defend for fraud unconnected with its execution, was based on the common law that a party to a sealed instrument was bound by its recitals, at law, unless its execution was induced by such fraud as to render it not the party's deed.—Maine Northwestern Development Co. v. Northern Commercial Co., U. S. D. C., 213 Fed. 103.

22.——Practical Construction.—The construction of an ambiguous contract placed thereon by the parties thereto, will generally be accepted.—Indiana Veneer & Lumber Co. v. Hageman, Ind., 105 N. E. 253.

23.——Rescission.—To enable a party to rescind, the fraud or misrepresentation relied on must have in fact induced him to make the contract, and must have been a part of the same transaction.—Harvey v. Squire, Mass., 105 N. E. 355.

24. **Corporations**—De Facto.—If the company seeking to condemn land was a de jure corporation, evidence of its de facto existence was not admissible.—Vallejo & N. R. Co., v. Reed Orchard Co., Cal., 140 Pac. 955.

25.——Dividends.—The term "profits" and "dividends" are not synonymous; dividends being properly declared only from profits after they have been earned.—Indiana Veneer & Lumber Co. v. Hageman, Ind., 105 N. E. 253.

26.——Eminent Domain.—An objection that a corporation, seeking to condemn land for a right of way, is a subsidiary one, acting in combination with other similar corporations in pursuit of an unlawful conspiracy in restraint of trade, is a collateral attack on the legality of the existence of the corporation and is not permissible in the condemnation proceedings.—Joliff v. Muncie Electric Light Co., Ind., 105 N. E. 234.

27.——Stockholder.—Under an agency contract whereby plaintiff was to purchase shares of the stock of defendant company, agreement that, on termination of the agency, the company would repurchase the stock at the price paid for it held valid, where the stock was not a part of the original unsubscribed stock.—Hesse Envelope Co. of Texas v. Addison, Tex., 166 S. W. 898.

28.——Stock Subscription.—In an action on a stock subscription contract, that plaintiff's president, managing director and promoter, who obtained the subscription, was at the same time acting in his own interest, and that the contract was therefore fraudulent, held available as a defense at law.—Maine Northwestern Development Co. v. Northern Commercial Co., U. S. D. C., 213 Fed. 103.

29. **Criminal Law**—Instructions.—Though defendant made too narrow a request for instruction, it was the court's duty to instruct.—Fakes v. State, Ark., 166 S. W. 963.

30.——Separation of Jury.—In a felony case, where a juror slipped off and went two or three blocks, got his horse and took him to a livery stable, the streets being full of people, and he spoke to two, defendant should have been granted a new trial, the state not showing that nothing improper took place during the separation.—Somers v. State, Tex., 166 S. W. 1156.

31. **Damages**—Evidence.—Complaints of pain and suffering after commencement of suit, as well as before, relating to present existing pain and suffering and connected with and resulting from the injury, held admissible.—Indianapolis Traction & Terminal Co. v. Gillaspy, Ind., 105 N. E. 242.

32.——Measure of.—In an action for injuries to an employe in a furniture factory, where it appeared that the plaintiff was a paper hanger by trade, and that his work in the factory was merely temporary, evidence as to his earning capacity as a paper hanger was admissible.—Evansville Furniture Co. v. Freeman, Ind., 105 N. E. 258.

33. **Death**—Surviving Wife.—In an action under the statute by the surviving wife, parents, etc., there can be no recovery, unless plaintiffs had reasonable expectation of pecuniary benefit from deceased.—Gulf, C. & S. F. Ry. Co. v. Hicks, Tex., 166 S. W. 1190.

34. **Divorce**—Alimony.—A personal judgment for alimony cannot be rendered in a divorce action against a nonresident defendant served only by publication.—Shillock v. Shillock, Cal., 140 Pac. 954.

35.——Condonation.—Condonement is forgiveness conditioned on future good conduct.—Kostachek v. Kostachek, Okla., 140 Pac. 1021.

36. **Equity**—Cross-Bill.—While the filing of a cross-bill founded on matters of equitable cognizance will cure any defects of jurisdiction under the original bill, yet if the cross-bill fails to state grounds for equitable relief, the defect is not cured.—La Mesa Community Ditch v. Applezoeller, N. M., 140 Pac. 1051.

37.——Quieting Title.—Under the maxim, "He who seeks equity must do equity," the purchaser of land at a bankruptcy sale, who agreed to pay a judgment lien thereon, the amount of which was considered in fixing the price, is not entitled to quiet his title against the lien.

even though the judgment is invalid.—Hoper v. Bank of Two Rivers, Ill., 105 N. E. 311.

38. **Estoppel**—Municipality.—The doctrine of equitable estoppel applies to a city if justice requires that it do so.—Otis Elevator Co. v. City of Chicago, Ill., 105 N. E. 338.

39. **Evidence**—Admissibility.—In an action for breach of a written contract for the sale of a livery business and leasehold containing no stipulation binding defendants not to re-engage in the same business, evidence of a parol agreement to that effect was inadmissible.—Ordelheide v. Traube, Mo., 166 S. W. 1108.

40.——Contract.—Where, in a written promise to place money in trust for a child named after the signer of the instrument, no promisee was named, all the attendant conditions might be examined, for the purpose of determining to whom in fact the promise was made.—Gardiner v. Denison, Mass., 105 N. E. 359.

41.——Eminent Domain.—A witness testifying as to the value of property sought to be condemned by a railroad company could testify, for purposes of comparison, as to the sale of land which was only a few blocks from the property sought to be condemned though the other land constituted a lot in a small town; the other tract also being capable of division into town lots.—Vallejo & N. R. Co. v. Reed Orchard Co., Cal., 140 Pac. 955.

42. **Explosives**—Nuisance.—The collection by a steamship company of a large quantity of dynamite in a harbor for shipment is not in itself a nuisance which alone renders the company liable for any injurious consequences which may result, but it is liable only for negligence in the handling of the explosive.—State of Maryland v. General Stevedoring Co., U. S. D. C., 213 Fed. 51.

43. **Fraud**—Agency.—In an action against an officer of a corporation for damages due to defendant misrepresenting his authority to bind the corporation by a contract to employ plaintiff for life in settlement of a claim for personal injuries, the measure of damages is the loss from failure to secure a valid contract, and not the value of the personal injury claim.—Pierson v. Holdridge, Kan., 140 Pac. 1032.

44.——Concealment.—Where the vendor of land conceals a hidden defect which the purchaser could not discover by ordinary examination, he is guilty of actionable fraud.—Adkins v. Stewart, Ky., 166 S. W. 984.

45. **Fraudulent Conveyances** — Statute of Frauds.—Under the statute of frauds and the Attachment Act, creditors may treat a conveyance by the debtor in fraud of creditors as void, and the levy of an attachment is an election to treat it as void.—Pease v. Frank, Ill., 105 N. E. 299.

46. **Garnishment**—Amendment of Petition—Where the original suit in which a writ of garnishment was sued out was brought against an alleged corporation, and after service of the writ the petition was amended, so as to make the action one against an individual instead of a corporation, the garnishment proceedings were thereby discharged.—Pickering Mfg. Co. v. Gordon Tex., 166 S. W. 899.

47. **Homicide**—Provocation.—While the provocation must arise at the time of the commission of the offense, yet antecedent matters should be considered in passing upon the state of defendant's mind; but the court should not enumerate them, but tell the jury they must look to all the facts and circumstances in the case.—Willis v. State, Tex., 166 S. W. 1172.

48. **Husband and Wife**—Agency of Husband.—While the jury might have inferred that the husband represented the wife in the making of a settlement in which both were interested, from testimony that with her knowledge and assent he acted generally in the management of her business affairs, the bare marital relationship was insufficient to warrant the inference of agency.—Harvey v. Squire, Mass., 105 N. E. 355.

49. **Infants**—Custody.—A state as parens patriae may promote the well-being of persons of defective understanding, or delinquents, or others burdened with misfortunes or infirmities so as to be unable to care for themselves, and the constitutional limitations will be so construed, if possible, to permit such supervision by the state.—State ex rel. Cave v. Tincher, Mo., 166 S. W. 1028.

50.——Loss of Wages.—An unemancipated minor, in an action for injuries, may not recover for loss of time, loss of wages, or decreased earning capacity during minority.—Chicago, S. B. & N. I. Ry. Co. v. Seaman, Ind., 105 N. E. 234.

51. **Insurance**—Beneficial Association.—Where the certificate required the member to abide by the by-laws of the order then in force or thereafter adopted, the by-laws may be amended so as to increase the amount of the assessments.—Supreme Lodge Knights of Honor v. Bieler, Ind., 105 N. E. 244.

52.——Waiver.—Where the soliciting agent of a life insurance company surrendered the notes given for the payment of the first premium by the insured, and took in exchange another note, which he forwarded to the general agents of the company, their acceptance of such note constituted a waiver of the right to forfeit the policy for nonpayment of the premium in money.—Pioneer Life Ins. Co. v. Cox, Ark., 166 S. W. 951.

53. **Judgment**—Amendment Nunc Pro Tunc.—The court may correct a record, so as to speak the truth and make the purported judgment conform to the real judgment which should have been rendered.—Vallejo & N. R. Co. v. Reed Orchard Co., Cal., 140 Pac. 955.

54.——Entry Nunc Pro Tunc.—The power of courts at law and in equity to make entries of judgments and decrees nunc pro tunc, when necessary to prevent injustice, is inherent in the courts.—Chester v. Graves, Ky., 166 S. W. 998.

55.—Error Coram Nobis.—A writ of error coram nobis to vacate a default judgment is granted only to correct an error of fact pertinent to the issues in the case.—Jeude v. Sims, Mo., 166 S. W. 1048.

56.——N. O. V.—If a motion for judgment notwithstanding the verdict was filed after judgment, it was too late, and, if it was filed before, it was overruled by the entry of a final judgment against the mover.—Okazaki v. Sussman, Wash., 140 Pac. 904.

57.——Pleading.—A default judgment cannot be sustained if plaintiff's petition does not state a good cause of action, or lacks those averments necessary to show his right to recover.—Davie's Ex'r. v. City of Louisville, Ky., 166 S. W. 969.

58.——Secret Trust.—The rule that a judgment is not a lien on property conveyed in fraud of creditors does not apply where there is a secret trust and the debtor remains the real owner.—Pease v. Frank, Ill., 105 N. E. 299.

59.——Void.—A judgment entered by the clerk in vacation for an amount different from that confessed by the plea of confession of action is void.—Hutson v. Wood, Ill., 105 N. E. 343.

60. **Larceny**—Conversion.—One who induced a woman to whom he became engaged to convey to him her land, representing that he could sell it to better advantage if she did so, and thereafter sold the land and converted the proceeds to his own use, as he intended at all times to do, was guilty of larceny.—Morton v. Commonwealth, Ky., 166 S. W. 974.

61. **Libel and Slander**—Pleading.—All circumstances in mitigation, other than such as tend to establish the truth of the charge, may, in slander, be proved without being pleaded.—Pouchan v. Godeau, Cal., 140 Pac. 952.

62. **Liens**—Equity.—An "equitable lien" is simply a right of a special nature over the thing, and it is essential to such lien that while it continues the possession remain with the debtor.—Klaustermeyer v. Cleveland Trust Co., Ohio, 105 N. E. 278.

63. **Limitation of Actions**—Demand.—Where a deposit is an indefinite one, limitations do not begin to run until demand.—Stone v. St. Louis Union Trust Co., Mo., 166 S. W. 1091.

64.——Personal Defense.—Limitations is a personal defense of which the party may or may

not desire to avail himself, and cannot be raised by demurrer, but must be pleaded.—Davie's Ex'r. v. City of Louisville, Ky., 166 S. W. 969.

65. **Master and Servant**—Assumption of Risk.—Where there are two ways of performing a duty by an employe, one of which is known to him to be safe, and the other to be dangerous, and he voluntarily chooses the dangerous way, and is injured, he cannot recover, because he assumes the risk.—Pulse v. Spencer, Ind., 105 N. E. 263.

66.——Consideration.—To make valid the modification of a contract of employment for a certain term, so as to reduce the employe's salary, some consideration must have passed to the employe.—Indiana Veneer & Lumber Co. v. Hageman, Ind., 105 N. E. 253.

67.——Employment.—It was no defense to an employer's breach of an employment contract that the employe refused to accept a lower salary than that agreed on.—Miller v. Sealy Oil Mill & Mfg. Co., Tex., 166 S. W. 1182.

68.——Guarding Machinery.—The statute requiring an employer to guard a machine forbids him to operate such machine before it has been properly guarded, or to operate it after the guard has become defective and the master has knowledge of that fact.—Evansville Furniture Co. v. Freeman, Ind., 105 N. E. 258.

69.——Invitee.—Where defendant employed R. & Sons to install an engine on a dredge, and a servant of R. & Sons was injured as the result of negligence of defendant's employes, while on the premises just before the commencement of his work, he was an invitee as to whom defendant owed the duty of reasonable care, and not a servant of defendant.—Middleton v. P. Sanford Ross, U. S. C. C. A., 213 Fed. 6.

70.——Question of Fact.—The question of the master's negligence is for the jury, unless the testimony is without conflict, and is such that reasonable men could not differ thereon.—Carney Coal Co. v. Benedict, Wyo., 140 Pac. 1013.

71.——Respondeat Superior.—A railroad company is not liable for injuries to an employe of a lumber company resulting from the negligence of other employes of that company, which was engaged at the time in constructing a track to be later turned over to the railroad company upon payment of the cost of construction.—Angelina & N. R. R. Co. v. Due, Tex., 166 S. W. 918.

72. **Mines and Minerals**—Oil Lease.—An oil lease of premises for five years, and as much longer as oil is found in paying quantities, conveys a freehold estate, since it may continue indefinitely.—Daughtee v. Ohio Oil Co., Ill., 105 N. E. 308.

73. **Negligence** — Attractive Nuisance.—The rule that an owner of premises, who permits to remain thereon a dangerous appliance which is attractive to children, is liable for injuries reasonably to be anticipated has no application, in the absence of negligence in maintaining the appliance on the premises.—St. Louis, I. M. & S. Ry. Co. v. Wagoner, Ark., 166 S. W. 948.

74.——Invitee.—One who goes on the premises of another for the benefit, real or supposed, of the owner or occupant, or in a matter of mutual interest, or in the ordinary course of their business, or for the performance of some duty, is an invitee.—Middleton v. P. Sanford Ross, U. S. C. C. A., 213 Fed. 6.

75. **Parent and Child**—Control of Child.—While the parent has a natural right of control, it is not inalienable, and, even in absence of statute, courts of equity may place children under guardianship.—State ex rel. Cave v. Tincher, Mo., 166 S. W. 1028.

76. **Partnership**—Confidential Relationship.—Where the partners managing a banking partnership loaned the funds of the bank at 6 per cent interest, except the amount deposited with another bank in which they were interested at 2 per cent, a copartner could recover from the partners the loss by the deposit in the other bank.—Horn v. Lupton, Ind., 105 N. E. 237.

77. **Party Wall**—Encroachment.—The use of a wall by an adjacent owner on which to erect a building is a permanent encroachment, and the owner, not authorizing the erection, is entitled to equitable relief without showing actual damages.—Evans v. Pettus, Ark., 166 S. W. 955.

78. **Principal and Agent**—Undisclosed Principal.—An undisclosed principal may sue on a contract entered into by an agent for his benefit.—Eldridge v. Mowry, Cal., 140 Pac. 978.

79. **Railroads**—Crossing.—A traveler about to cross railroad tracks is bound to stop, look, and listen only when he can neither see nor hear, and where, from a point 40 feet from the crossing, he saw that there was no train within between 700 and 900 feet, he is not bound to stop before proceeding on the tracks.—Lagarce v. Missouri Pac. Ry. Co., Mo., 166 S. W. 1063.

80.——Crossing.—A railroad crossing, being a dangerous place, a person, before venturing upon same, must both look and listen, at a convenient distance from the crossing and where the look will be effective.—Osborn v. Wabash R. Co., Mo., 166 S. W. 1118.

81.——Fencing Tracks.—Where, in an action against an interurban railroad company for killing a horse on its tracks, the complaint alleged the failure of the company to fence its tracks and maintain cattle guards, a general verdict for plaintiff, and special findings that the place where the track was unfenced had been selected for the reception and discharge of passengers, but had not been so used except in rare instances, held not inconsistent.—Chicago, — & N. I. Ry. Co. v. Ness, Ind., 105 N. E. 250.

82.——Grade Crossings.—In the exercise of its police power, a city may, subject to constitutional limitations, require a railroad company to elevate its tracks so as to avoid grade crossings.—Otis Elevator Co. v. City of Chicago, Ill., 105 N. E. 338.

83.——Last Clear Chance.—Where the engineer in charge of a train proceeding through a country district saw an object on the track which he did not take to be a human being, and so did not stop his engine, the railroad company is not liable where it was too late to avoid running down deceased when the engineer discovered that the object was a human being.—Joy v. Chicago, B. & Q. R. Co., Ill., 105 N. E. 330.

84. **Receivers**—Agency.—A receiver holds funds in his hands subject to the orders of the court, having supervision over the receivership, and all persons dealing with him are chargeable with knowledge thereof.—Stone v. St. Louis Union Trust Co., Mo., 166 S. W. 1091.

85. **Removal of Causes**—Separate Controversy—Where plaintiff's declaration against a resident and non-resident defendant shows a joint liability, the suit is not removable by the non-resident defendant on the ground of separable controversy, in the absence of showing fraudulent and merely colorable joinder of the resident defendant.—Jones v. Casey-Hedges Co., U. S. D. C., 213 Fed. 43.

86. **Replevin**—Damages.—Where there was no certain evidence that defendant in replevin suffered damages from plaintiff's taking possession of the horse in controversy, a verdict for defendant for damages cannot be sustained.—Roth v. Yara, N. M., 140 Pac. 1071.

87. **Sales**—Tender.—Where a buyer offers to restore goods, and the seller absolutely refuses them, the buyer is relieved from actually returning or tendering them.—Jones v. McGinn, Ore., 140 Pac. 994.

88. **Tenancy in Common**—Easement.—A tenant in common cannot create easement so as to confer any rights which may be asserted against cotenants, who may resort to any remedy to protect their interests against an alleged easement.—Evans v. Pettus, Ark., 166 S. W. 955.

89. **Wills**—Precatory Trust.—A will, which gives to testator's wife all his property "knowing she will deal properly with" his grandchild and his son, does not create a precatory trust in favor of the grandchild or son.—Snyder v. Toler, Mo., 166 S. W. 1059.

90.——Testamentary Capacity.—Testamentary incapacity implies the want of intelligent mental power.—Scott v. Townsend, Tex., 166 S. W. 1138.